

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|---|---|--------------------|
| PATRICK MILLS |) | |
| Claimant |) | |
| VS. |) | |
| |) | Docket No. 157,710 |
| UNIVERSITY OF KANSAS |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| STATE SELF INSURANCE FUND |) | |
| Insurance Carrier |) | |
| AND |) | |
| |) | |
| KANSAS WORKERS COMPENSATION FUND |) | |

ORDER

The respondent and Kansas Workers Compensation Fund both appeal from an Award on Review and Modification and from an Order for Compensation during Vocational Rehabilitation entered by Administrative Law Judge Floyd V. Palmer, dated June 30, 1997. The Board heard oral argument on November 14, 1997.

APPEARANCES

Claimant appeared by his attorney, Chris Miller of Lawrence, Kansas. Respondent and its insurance carrier appeared by their attorney, Jeff K. Cooper of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Eugene C. Riling of Lawrence, Kansas.

RECORD AND STIPULATIONS

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge modified the Award from a 25 percent permanent partial disability based on impairment of function to 77.3 percent work disability for the period from March 28, 1995 to August 14, 1996, and then 74.7 percent work disability thereafter. Respondent and the Workers Compensation Fund both contend that the evidence does not support an increase to a work disability. Both also disagree with the decision by the Administrative Law Judge to award vocational rehabilitation benefits.

FINDINGS AND CONCLUSIONS

After reviewing the record and considering the arguments, the Appeals Board concludes that claimant has not established a right to a work disability or vocational rehabilitation benefits. The Award by the Administrative Law Judge should be reversed.

FINDINGS OF FACT

1. Claimant worked for respondent, University of Kansas, in the facilities and operations department for approximately 20 years (claimant testified he was starting his 22nd year at the time of the regular hearing). Claimant suffered a series of injuries to his hands, arms, shoulders, and neck from May of 1990 through July 18, 1991.
2. Respondent provided medical treatment which included carpal tunnel releases and, for thoracic outlet syndrome, a resection of his first rib on the right.
3. On July 12, 1993, the parties entered an Agreed Award based on a 25 percent permanent partial impairment to the body as a whole. The Agreed Award provided that claimant retained the right to review and modify the award.
4. Claimant returned to work for respondent, after the accident and treatment, at a comparable wage. Prior to the injuries, claimant worked as a supervisor but also performed a portion of the physical labor along with those he supervised. After the injuries, respondent allowed claimant to supervise only. Claimant did some physical labor but was permitted to stop if and when it caused problems.
5. Claimant was verbally counseled three to five times in 1994 for performance deficiencies relating to his supervision of other workers. In May of 1994 claimant was given a written report of counseling for allowing employees under his supervision to play basketball during working hours.
6. Although claimant's 1994 employee evaluation was expected to be a lower rating than the exceptional rating he received in 1993, claimant was not in jeopardy of losing his job in the foreseeable future.
7. Claimant resigned from his job with respondent as of December 16, 1994.

8. Claimant's injuries had worsened at the time he left employment for respondent, but he remained physically able to perform the duties of his job for respondent.

9. The Board finds claimant resigned voluntarily and not because he was about to be terminated or because he was physically unable to perform the duties.

CONCLUSIONS OF LAW

1. When claimant returned to work for respondent after his accident at a comparable wage, he became subject to a presumption that he has no work disability. K.S.A. 1991 Supp. 44-510e provides in part as follows:

There shall be a presumption that the employee has no work disability if the employee engages in any work for wages comparable to the average gross weekly wage that the employee was earning at the time of the injury.

2. An employee may not voluntarily reject suitable employment at a comparable wage and thereby become entitled to work disability. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

3. Claimant has in effect, by voluntarily terminating his employment for respondent, rejected employment at a comparable wage, employment he remained physically capable of performing.

4. Claimant has shown by his testimony and the testimony of Edward J. Prostic, M.D., that his injuries have worsened since the Agreed Award. Claimant has not, however, established the extent of increase, if any, in his functional impairment. Dr. Prostic provided the only medical testimony. Dr. Prostic testified that claimant's physical condition had deteriorated but he did not give any opinion as to the extent, if any, of increase in impairment. Although medical testimony is not essential to establish nature and extent (McKinney v. General Motors Corp., 22 Kan. App. 2d 768, 921 P.2d 257(1996)) the evidence in this case is too vague and general to permit a reasonable assessment. The Board, therefore, finds claimant has not met his burden of showing the extent of any increase in the functional impairment.

5. Claimant is not entitled to a modification of the nature and extent of disability agreed to in the original award.

6. Claimant is not entitled to vocational rehabilitation. K.S.A. 1991 Supp. 44-510g provides that an injured employee is entitled to an order initiating evaluation for vocational rehabilitation services in cases where the employee has remained off work for 90 days. While the statute does not expressly so state, the Board concludes the statute was intended to apply when the employee is off because of the injuries. As the Court of Appeals indicated in the Foulk decision, the legislature did not intend to allow a claimant

to receive additional benefits in the form of work disability by refusing employment. The same rationale applies to vocational rehabilitation benefits. The Board finds here that claimant's actions were the equivalent of refusing employment at a comparable wage and claimant is, therefore, not entitled to vocational rehabilitation benefits.

AWARD

WHEREFORE, the Appeals Board finds that the Award on Review and Modification, entered June 30, 1997, and the Order for vocational rehabilitation benefits, also entered June 30, 1997, should be, and the same are hereby, reversed. The Agreed Award of July 12, 1993, remains in effect as originally entered.

IT IS SO ORDERED.

Dated this ____ day of December 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Chris Miller, Lawrence, KS
Jeff K. Cooper, Topeka, KS
Eugene C. Riling, Lawrence, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director